(1)

No. ____

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

HIROKUNI HONZAWA, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, and TAKARA INDUSTRY CORPORATION,

Petitioners,

—against—

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a $15 million punitive damage award—rendered when a New York appellate court *increased* the trial court judgment of $10 million—is unconstitutionally arbitrary and excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), where, as here:

a. the New York appellate court failed to engage in exacting appellate review or to apply the constitutional "guideposts" designed to ensure the $15 million punitive damages award was reasonable and proportional;

b. the New York appellate court based its decision to increase punitive damages on two factors supposedly showing that Petitioners had "immense" wealth, even though the trial court had found that Respondents failed to submit evidence concerning Petitioners' supposed wealth, and even though considering wealth as a surrogate for a Due Process review is impermissible;

c. the award greatly exceeds the amount of civil penalties that could be imposed under relevant state law;

d. the New York appellate court failed to apply the factors for determining whether the Petitioners' actions were reprehensible; and

e. the award is nearly five times substantial compensatory damages.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners are Hirokuni Honzawa, an individual, and Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Company, and Takara Industry Corporation (the "Corporate Petitioners"), each privately-held corporate entities owned directly by four corporations organized and existing in Japan, and in turn wholly-owned by Hirokuni Honzawa. The Corporate Petitioners own varying percentages of the following companies: Hiro Investments, LLC, 655 Property, LLC, 100 Property, SPE LLC, 100 Property Associates, LLC, 100 Property, LLC, Takara Holding, LLC, Takara Associates, Inc., 617 Property, LLC, and 39 AF Property, LLC. None of these entities are publicly held, and none are owned in whole or in part by any other corporate entity other than the Corporate Petitioners.

Respondents Mitsuhiro Honzawa and Yukiko Honzawa are individuals.

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Petitioners Hirokuni Honzawa, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Company, and Takara Industry Corporation respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

OPINIONS BELOW

The post-trial order dated August 15, 2002, and the final Judgment, entered September 12, 2002 of the Supreme Court of the State of New York, County of New York, are attached at Pet. App. 18a and 8a respectively. The order and judgment of the Supreme Court of the State of New York, Appellate Division, First Department, dated October 21, 2003, is attached at Pet. App. 4a and reported at *Honzawa v. Honzawa*, 309 A.D.2d 629, 766 N.Y.S.2d 29 (1st Dep't 2003). The order of the Court of Appeals of the State of New York dismissing appeal, dated December 23, 2003, is attached at Pet. App. 1a and reported at *Honzawa v. Honzawa*, 1 N.Y.3d 564, 2003 WL 23144905 (N.Y. 2003).

JURISDICTION

The Court of Appeals of the State of New York dismissed Petitioners' appeal as of right from an order and judgment of the Supreme Court of the State of New York, Appellate Division, First Department on December 23, 2003. (Pet. App. 4a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).[1] Petitioners file this Petition from the Court of Appeals' final order of dismissal.

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[1] Subsequent to the Court of Appeals' dismissal, Petitioners filed a motion for permission to appeal to the Court of Appeals pursuant to N.Y. Civ. Prac. L. & R. 5602(a). The motion remains pending.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV

"[N]or shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

1. This malicious prosecution case presents the latest example of a State appellate court's refusal to engage in the exacting *de novo* review of a trial court's punitive damages award dictated by this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).[2] The New York appellate court here *increased* punitive damages from $10 million to $15 million based upon Petitioner Hirokuni Honzawa's alleged, but unproven, "immense" wealth. (Pet. App. 6a.) In increasing punitive damages, the New York appellate court failed to consider the reprehensibility of the Petitioners' actions, the proportionality of the award to the Respondents' harm, or the proportionality of the award to similar civil penalties—all factors this Court identified as crucial to ensure adherence to the due process requirements of reasonableness and proportionality. The

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[2] Since *State Farm*, other such instances in which this Court remanded a punitive damages award for further, *de novo* review include *Philip Morris USA Inc. v. Williams*, 124 S. Ct. 56 (2003); *Cass v. Stephens*, 123 S. Ct. 2213 (2003); *Ford Motor Co. v. Ramon Romo*, 123 S. Ct. 2072 (2003); *Ford Motor Co. v. Smith*, 123 S. Ct. 2072 (2003); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Textron Financial Corp.*, 123 S. Ct. 1783 (2003); *San Paolo U. S. Holding Co., Inc. v. Simon*, 123 S. Ct. 1828 (2003); *Key Pharmaceuticals, Inc. v. Edwards*, 123 S. Ct. 1781 (2003); and *Anchor Hocking, Inc. v. Waddill*, 123 S. Ct. 1781 (2003).

appellate court also refused to consider that the compensatory damages awarded, consisting of emotional distress and legal fees, were themselves inherently punitive. The award is believed to stand as the *highest punitive damages award* for malicious prosecution in New York State, in an action in which there was no arrest or physical injury.

2. The origins of this case lie in a broader business dispute relating to ownership of certain Japanese-based real estate and warehousing companies—a dispute ultimately resolved in Japan in favor of Petitioner Hirokuni Honzawa ("Hirokuni"). By way of background, in 1978, Hirokuni had entrusted responsibility to Mitsuhiro Honzawa ("Mitsuhiro"), his younger brother, to deposit certain corporate funds in bank accounts in Hong Kong. The corporate funds remained in Hong Kong until a dispute arose in late 1994 between Hirokuni and Mitsuhiro over, among other things, Mitsuhiro's mismanagement of the Corporate Petitioners' real estate holdings in the United States and false claims of ownership of the Japanese companies, including through his Japanese counsel, Mr. Maruyama. In September 1995, Hirokuni received information that Mitsuhiro had secretly misappropriated $2.4 million from the Hong Kong bank accounts while Hirokuni was hospitalized with a heart condition. In November 1995, Mitsuhiro was terminated from all positions by the companies.

All of the above events preceded the lawsuit upon which this malicious prosecution action is based. Therefore, these events are irrelevant in establishing any damages that could have resulted from such lawsuit.

3. After he was terminated from the Japanese companies, Mitsuhiro commenced a series of lawsuits in Japan (Mitsuhiro's "Japanese Actions"). In the Japanese Actions, Mitsuhiro sought, among other things, a dec-

laration that he shared ownership of the Japanese companies equally with Hirokuni.

4. Believing that the misappropriated $2.4 million included corporate funds of Petitioner Takara International, Inc. ("Takara"), and believing some of the moneys had been deposited in a New York bank account, Hirokuni thereafter caused Takara to commence an action for replevin in Supreme Court of the State of New York, County of New York (the "Prior Action"). Takara also obtained an attachment of the New York account funds in the amount of $250,000. The case was removed to the United Stated District Court for the Southern District of New York where, after a seven-day trial, the court denied Takara's claim, and deferred judgment to allow the parties to negotiate damages against Takara for wrongful attachment under state law. The parties negotiated a damages award of $550,000, and a judgment against Takara was entered.

5. Mitsuhiro and his wife Yukiko thereafter commenced the present malicious prosecution action against Takara and sixteen other individuals and entities seeking billions of dollars in punitive damages. Because the lawsuit was based only on the Prior Action—not the entire business dispute—Mitsuhiro had to premise his demand for compensatory and punitive damages upon harm resulting only from the Prior Action. (Pet. App. 51a-53a.) This he did not and could not do. However, he made much broader allegations that he was an "owner" and "principal" of the Japanese companies (an assertion later ruled false by the highest Japanese court) and that the alleged reputational harm caused by the Prior Action was used as reason to "oust" him from the companies.[3]

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[3] It is undisputed that prior to the date on which the Boards resolved to terminate Mitsuhiro as an officer and director of each of the companies, he had delivered a written resignation, which he

Indeed, at the trial of this action, Mitsuhiro asserted to the jury that the "allegations of theft" in the Prior Action were made as a "basis for terminating his employment" and to "try and seize control" of the Japanese businesses by "using this case and allegations in this case" to ruin his reputation. Founded upon this theory, Mitsuhiro asked the jury to "impose punitive damages." (Pet. App. 56a-61a.)

6. However, Mitsuhiro conceded that he was terminated from his employment *before* the Prior Action was commenced, and he did not offer any other evidence of harm to his reputation relating to the Prior Action. (Pet. App. 23a, 51a-53a.) The trial court, accordingly, ruled that Mitsuhiro had failed to meet his burden of proving direct economic or reputational harm resulting from the Prior Action. *Id.* The jury was nevertheless apparently ignited by a belief that Mitsuhiro had been treated unfairly, and awarded him as compensatory damages $1,148,763 owed to Mitsuhiro's American attorneys, $691,667 owed to his Japanese attorneys, $1,131,250 for alleged emotional distress, $900,000 in lost consortium, and *$50 million* in punitive damages. (Pet. App. 19a.)

7. Petitioners challenged the $50 million punitive damages award and requested that the trial court conduct a *de novo* review of the award under the "guidepost" analysis set forth in this Court's decisions in *BMW* and *Cooper*. Petitioners also challenged the emotional distress and lost consortium damages as unsubstantiated by the evidence. The trial court offered remittitur of punitive damages to $10 million, and vacated the emotional distress and lost consortium awards, leaving attorneys fees as the only allowable compensatory damages. (Pet. App. 27a.)

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alleged he thereafter withdrew. The Japanese Courts have since ruled the termination lawful.

8. Shortly after the trial court entered the Judgment in this case, the Tokyo High Court rejected Mitsuhiro's assertion in the Japanese Actions that he was an owner of the Japanese companies. The Tokyo High Court confirmed that Hirokuni had previously acquired ownership and was the sole owner of the Japanese companies. Mitsuhiro's claim was characterized as being "without any ground." The Tokyo High Court's ruling was subsequently affirmed by the Japanese Supreme Court.

9. On appeal from the trial court's judgment in the present case, Petitioners argued that the $10 million in punitive damages was "excessive," and violated Petitioners' due process rights. (*See* Pet. App. 3a.) In particular, Petitioners asserted that the trial court, in making its remittitur decision, had failed to apply properly the constitutional guideposts set forth in *BMW*, *Cooper*, and *State Farm*.

On October 21, 2003, the Appellate Division *increased* punitive damages to $15 million, without engaging in the requisite *de novo* review and without applying the guideposts mandated by this Court in *BMW*, *Cooper*, and *State Farm*. (Pet. App. 6a.) Contrary to *State Farm*, the Appellate Division instead pointed to Hirokuni's purported wealth as the principal factor in evaluating punitive damages—namely, the "the immense value of the family businesses" owned by Petitioner and his ability to pay "millions" in legal fees. (Pet. App. 6a.) The Appellate Division also reinstated the emotional distress and lost consortium awards. (Pet. App. 6a.)

10. Petitioners filed an appeal as of right to the Court of Appeals of the State of New York on constitutional grounds. (Pet. App. 37a.) The Court of Appeals dismissed the appeal on the jurisdictional ground that the punitive damages award did not constitute a "substantial" constitutional question on appeal. (Pet. App. 1a.)

Thereafter, Petitioners filed a motion for leave to appeal to the Court of Appeals of the State of New York on all issues. The motion is currently pending.

REASONS FOR GRANTING THE PETITION

In *BMW*, and thereafter in *Cooper* and *State Farm*, this Court ruled that due process forbids "grossly excessive or arbitrary" punitive damage awards. To guarantee due process, the Court in *State Farm* directed all appellate courts to engage in "[e]xacting appellate review" to "ensure both reasonableness and proportionality" in punitive damages awards. 123 S. Ct. at 1525-26. *State Farm* requires courts to consider three "guideposts" first set forth in *BMW*: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 1520; *accord BMW*, 517 U.S. at 575; *see Cooper*, 532 U.S. at 440. In virtually every respect, the Appellate Division failed to follow the dictates of *BMW*, *Cooper*, and *State Farm*. And its decision to increase punitive damages to $15 million cannot be reconciled with those dictates.

I. THE APPELLATE COURT FAILED TO CONSIDER THE DISPARITY BETWEEN THE HARM SUFFERED AND THE PUNITIVE DAMAGES

In *State Farm*, the Court stated that, based upon its "jurisprudence and the principles it has now established, . . . few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 123 S. Ct. at 1524. Moreover, while a higher ratio may be warranted where

"a particularly egregious act has resulted in only a small amount of economic damages," the opposite is true where "compensatory damages are substantial." *Id.* When "substantial"—as with the $1 million compensatory damages award in *State Farm*—"then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *Id.* (emphasis added). Indeed, this "ratio" guidepost ensures due process by requiring a reasonable proportion to the "harm to the victim caused by the defendant's actions." *Cooper*, 532 U.S. at 435.

The Appellate Division failed to consider whether the $15 million to which it *increased* punitive damages bore a reasonable relationship to compensatory damages, as both *State Farm* and *BMW* require. Here, the economic harm that Mitsuhiro set out to establish was harm to his reputation which caused him to be "ousted" from ownership of the Japanese companies. (Pet. App. 6a.) Mitsuhiro was incapable of proving economic harm, and his claim was precluded, because he failed to proffer *any* evidence of a failed reputation, much less a failed reputation caused by the Prior Action. (Pet. App. 51a-54a.) Indeed, Mitsuhiro was terminated from his employment *before* the Prior Action was commenced, and his alleged ownership interest in the Japanese companies was adjudged "without any ground" by the Japanese courts.

Mitsuhiro's compensatory damages, accordingly, were limited to attorneys fees incurred in the Prior Action, and emotional harm and lost consortium relating to his involvement in the Prior Action. (Pet. App. 6a.) As in *State Farm*, the compensatory damages awarded were a "substantial" $3,171,670. The $15 million punitive damages award is almost *five times* compensatory damages—well in excess of the "equal" ratio to compensatory damages that *State Farm* considered the potential "out-

ermost limit of the due process guarantee" where, as here, compensatory damages are "substantial." 123 S. Ct. at 1524.

The Appellate Division exacerbated its error by further failing to consider the portion of the compensatory damages that were by their nature punitive. In *State Farm*, the Court explained that the "compensatory damages for the injury suffered here"—emotional distress—"likely were based on a component which was duplicated in the punitive award." 123 S. Ct. at 1525. Indeed, as with Mitsuhiro in the present case, the distress in *State Farm* was caused by the "outrage and humiliation the [plaintiffs] suffered at the actions of [the defendant]; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element." *Id.* As with the Utah courts in *State Farm*, the Appellate Division's failure to consider the punitive component of emotional distress and lost consortium damages resulted in a punitive damages award that is duplicative.[4]

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[4] The Appellate Division also failed to consider that the award of attorneys fees also includes a component that is, by its nature, punitive. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (courts may impose an award of attorneys fees "when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons") (citations omitted); 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Indeed, under the "American Rule," fee shifting in litigation is ordinarily prohibited, with limited exception to compensation awarded under statutory enactments relating to private attorneys general, or as a punitive sanction for improper judicial conduct. *See Chambers*, 501 U.S. at 45. The attorneys fees damages awarded in the present malicious prosecution action resemble the latter, punitive, component resulting in a punitive damages award that is further duplicative.

In short, and contrary to the standards of review declared in *BMW*, *Cooper*, and *State Farm*, the Appellate Division apparently made *no effort* to determine whether the $15 million to which it increased punitive damages bore a reasonable "ratio" to compensatory damages. For this reason alone, certiorari should be granted.

II. THE APPELLATE COURT FAILED TO CONSIDER THE DISPARITY BETWEEN PUNITIVE DAMAGES AND COMPARABLE SANCTIONS

Certiorari should also be granted because the Appellate Division failed to consider the "disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.' " *State Farm*, 123 S. Ct. at 1526, *quoting BMW*, 517 U.S. at 575. The reason for this guidepost is to ensure the defendant is accorded sufficient notice of the potential sanction for its actions. *BMW*, 517 U.S. at 574. In *State Farm*, the Court held that the disparity between punitive damages and the relevant civil penalty was unconstitutional, since "[t]he most relevant civil sanction under . . . state law for the wrong done to the [plaintiffs]" was a $10,000 fine. *Id.* Thus, the Court ruled that the punitive damages award represented a constitutionally unreasonable "disparity" because the potential $10,000 sanction for the defendant's conduct was "dwarfed by the . . . punitive damages award." *Id.*

The Appellate Division refused to consider any comparable sanction to determine whether Petitioners had been accorded notice of the penalty that was ultimately imposed for their alleged conduct. The *maximum* New York "sanction" for civil litigation commenced maliciously is $10,000. NYCRR § 130-1.1, 1.2. Moreover, in the last ten years, punitive damages awards in malicious prosecution cases in New York in which there was no

arrest or incarceration-related malicious prosecution—averaged between $10,000 and $150,000. *E.g. Lynch v. County of Nassau*, 278 A.D.2d 205, 717 N.Y.S.2d 248, 249 (2d Dep't 2000) (reducing punitive damages to $50,000); *Jackson v. Kessner*, 225 A.D.2d 403, 640 N.Y.S.2d 4, 5 (1st Dep't 1996) (affirming punitive damages of $150,000); *Coker v. City of Schenectady*, 200 A.D.2d 250, 252, 613 N.Y.S.2d 746 (3d Dep't 1994) (affirming punitive damages of $40,000); *Parkin v. Cornell University, Inc.*, 182 A.D.2d 850, 851, 581 N.Y.S.2d 914, 916 (3d Dep't 1992) (reducing punitive damages to $10,000); *Hart v. City of New York*, 186 A.D.2d 398, 399, 588 N.Y.S.2d 1012 (1st Dep't 1992) (reducing punitive damages to $100,000). As in *State Farm*, the Appellate Division would not have needed to "dwell long on this guidepost" because the punitive damages awarded by the Appellate Division are *100 to 1500 times more* than applicable civil penalties and punitive damages awarded in similar cases. 123 S. Ct. at 1526.

III. THE APPELLATE COURT FAILED TO CONSIDER THE APPROPRIATE FACTORS TO DETERMINE WHETHER THE PETITIONERS' CONDUCT WAS SUFFICIENTLY REPREHENSIBLE

In *State Farm*, the Court also reiterated the factors set forth in *BMW* that the Appellate Division should have considered in determining whether the Petitioners' actions were sufficiently "reprehensible" to warrant $15 million in punitive damages. 123 S. Ct. at 1521. In the first instance, the Appellate Division failed to presume, as *State Farm* requires, that Mitsuhiro was "made whole for his injuries by compensatory damages," particularly where as here the basis for the economic harm he claimed—harm to his reputation which resulted in his ouster from the Japanese companies—was held baseless.

Id. The Appellate Division further erred in failing to consider the standards that *State Farm* and *BMW* declared for determining whether an action was reprehensible. For example:

- *State Farm* and *BMW* set as a primary factor whether "the harm caused was physical as opposed to economic." 123 S. Ct. at 1521; *see BMW*, 517 U.S. at 576. This action did not include a claim for physical injury, the allegations of harm to Mitsuhiro's reputation were precluded as baseless, and the economic injury was limited to incurred legal costs;

- *State Farm* and *BMW* set as another factor whether "the tortious conduct evinced an indifference to or the reckless disregard of the health and safety of others." 123 S. Ct. at 1521; *see BMW*, 517 U.S. at 576. This case involved an alleged malicious prosecution arising from a business dispute and prior civil action, not a tort implicating health and safety;

- *State Farm* and *BMW* set as another factor whether "the conduct involved repeated actions or was an isolated incident." 123 S. Ct. at 1521; *see BMW*, 517 U.S. at 576. Mitsuhiro presented no evidence of repeated instances of alleged malicious prosecution;

- *State Farm* and *BMW* also set as a factor whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." 123 S. Ct. at 1521; *see BMW*, 517 U.S. at 576. The "malice" alleged in this action related primarily to the Petitioners' alleged attempt to injure Mitsuhiro's reputation as a pretext to oust him from ownership of the Japanese com-

> panies. Mitsuhiro failed to prove an injury to his reputation, and the Japanese Supreme Court has now ruled that Hirokuni has been the sole and rightful owner all along.

In *State Farm* and *BMW*, the Court declared that "any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of them all renders any award suspect." 123 S. Ct. at 1521. Here, it is questionable whether the evidence satisfied even *one* of the factors set forth in *State Farm* and *BMW*. Under these circumstances, *State Farm* makes it clear that *any* punitive damages award in this action is "suspect"—not to mention an *increased* $15 million award that greatly exceeds compensatory damages awarded, greatly exceeds civil penalties authorized for similar conduct under state law, and greatly exceeds the ratio of punitive to compensatory damage awards in prior similar cases. *Id.*

It bears repeating that Mitsuhiro's principal theory at trial and on appeal was that the alleged malicious prosecution was part of a conspiracy to harm his reputation as a basis upon which to "oust" him from ownership of the Japanese companies in Japan. Mitsuhiro was unable to prove harm to his reputation. More importantly, his alleged "ouster" in Japan—the issue on which the jury and the Appellate Division apparently seized to award record punitive damages—was appropriate as declared by the Japanese Supreme Court.

Thus, it appears that the Appellate Division, like the jury, relied upon Mitsuhiro's purported "ouster" from the Japanese companies as a basis for awarding excessive punitive damages. *State Farm*, however, made it clear that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *Id.* at

1522. In this case, the "conduct" of terminating Mitsuhiro from the Japanese companies was ruled lawful in Japan. Accordingly, any reliance upon the "conduct" in Japan was improper under *State Farm*.

The Appellate Division's failure to adhere to the principles set forth in *BMW*, *Cooper*, and *State Farm* rendered meaningless the appellate review this Court declared was the talisman for ensuring that punitive damages were consistent with due process. For these separate reasons, certiorari should be granted.

IV. THE APPELLATE COURT IMPROPERLY RELIED UPON PETITIONERS' ALLEGED, BUT UNPROVEN, FINANCIAL CONDITION IN INCREASING PUNITIVE DAMAGES

Rather than apply the "guideposts" mandated in *BMW* and *State Farm*, the Appellate Division increased punitive damages to $15 million on the ground that the trial court "fail[ed] to take into account the millions of dollars expended by defendants herein for legal fees in prosecuting the underlying action and the immense value of the family business." *Honzawa v. Honzawa*, 309 A.D.2d 629, 766 N.Y.S.2d 29, 30 (1st Dep't 2003). In *State Farm*, however, this Court declared that a defendant's wealth "bear[s] *no relation* to the award's reasonableness or proportionality to the harm," and "cannot justify an otherwise unconstitutional punitive damages award." 123 S. Ct. at 1525 (emphasis added). The Appellate Division's reliance upon wealth—namely, the amounts spent by Petitioners in legal fees and the value of Petitioner Hirokuni Honzawa's business holdings—as the principal basis for *increasing* punitive damages was constitutionally impermissible under *State Farm*. (Pet. App. 6a.)

Perhaps even more troubling is the arbitrary way in which the Appellate Division arrived at its opinion about Petitioners' wealth in increasing punitive damages. The trial court did not consider wealth as a material factor in determining punitive damages because Mitsuhiro *failed* "to submit evidence of defendants' current financial status." (Pet. App. 30a.) Thus, the amount of the Appellate Division's punitive damages award—even if it could properly be founded upon wealth—is sheer speculation. No evidence whatsoever was presented at trial about the real value of the petitioners' real estate holdings, net of the substantial debt that had been incurred.

It was this very "imprecise manner in which punitive damages systems are administered" that led the Court in *BMW*, *Cooper*, and *State Farm* to find that such damages raise concerns of constitutional proportion: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *State Farm*, 123 S. Ct. at 1520, *quoting Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). Here, there was no "presentation" of the Petitioners' "net worth," but the Appellate Division *increased* punitive damages based upon the Petitioners' *presumed* wealth nonetheless. This represented an arbitrary deprivation of property without due process, not only by a jury, but also by an appellate court.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: March 19, 2004

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APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

DECISION December 23, 2003
Mo. No. 1300 SSD 50

MITSUHIRO HONZAWA, *et al.*,

Respondents,

—v.—

HIROKUNI HONZAWA, *et al.*,

Appellants.

Appeal, insofar as taken from that portion of the Appellate Division order that denied appellants' motion to enlarge the record and affirmed Supreme Court's order denying appellants' motion to vacate the judgment, dismissed without costs, by the Court *sua sponte*, upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution; appeal otherwise dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of December 2003.

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1300 SSD 50

MITSUHIRO HONZAWA, *et al.*,

Respondents,

—v.—

HIROKUNI HONZAWA, *et al.*,

Appellants.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal, insofar as taken from that portion of the Appellate Division order that denied appellants' motion to enlarge the record and affirmed Supreme Court's order denying appellants' motion to vacate the judgment, be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that such portion of the order does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the appeal otherwise be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

STUART M. COHEN
Stuart M. Cohen
Clerk of the Clerk

Mazzarelli, J.P., Andrias, Ellerin, Friedman, Gonzalez, JJ.

1923

MITSUHIRO HONZAWA, *et al.*,

Plaintiffs-Respondents-Appellants,

Mark G. Westerfield

—against—

HIROKUNI HONZAWA, *et al.*,

Defendants-Appellants-Respondents,

Kenneth A. Lapatine

YOSHIKO HONZAWA, *et al.*,

Defendants.

1924

MITSUHIRO HONZAWA, *et al.*,

Plaintiffs-Respondents,

Robert O. Johnston

—against—

HIROKUNI HONZAWA, *et al.*,

Defendants-Appellants,

Kenneth A. Lapatine

YOSHIKO HONZAWA, *et al.*,

Defendants.

Judgment, Supreme Court, New York County (Ira Gammerman, J.), entered September 12, 2002, which, to

the extent appealed from as limited by the briefs, dismissed plaintiffs' claim for abuse of process and, after a jury verdict in favor of plaintiffs, set aside the award for emotional distress and loss of consortium, reduced the amount awarded for punitive damages from $50 million to $10 million and awarded plaintiff Mitsuhiro Honzawa the sum of $11,140,430, plus interest, costs and disbursements, unanimously modified, on the law and the facts, to the extent of reinstating the jury's award for emotional distress and loss of consortium and increasing the award for punitive damages to $15 million, and otherwise affirmed, with costs to plaintiffs. Order, same court and Justice, entered May 9, 2003, which denied defendants' motion to vacate the judgment, unanimously affirmed, with costs to plaintiffs.

The absence of proof that defendant Takara International, the plaintiff in the underlying action, had any claim upon the funds that it alleged were converted by plaintiff Mitsuhiro Honzawa, supports the jury's award of damages for malicious prosecution. Testimony by both Mitsuhiro and his brother, defendant Hirokuni Honzawa, concerning the substantial cash deposits they made to Hong Kong bank accounts demonstrates the absence of probable cause to prosecute the action. Having failed to demonstrate that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499; *see also Adam v. Ziriakus*, 92 NY2d 396, 400), defendants' motion to set aside the jury verdict as against the weight of the credible evidence was properly denied.

Plaintiffs established that defendant Hirokuni Honzawa's animosity towards his brother as the motivation for defendants' commencement of a wholly meritless law-

suit and the attachment of plaintiff Mitsuhiro Honzawa's accounts. While the evidence is therefore sufficient to sustain a cause of action for abuse of process (*see Curiano v Suozzi*, 63 NY2d 113, 116), this claim arises out of the same conduct as the malicious prosecution cause of action, and plaintiffs sought identical damages under their respective theories. While the two causes of action can be pleaded in the alternative, only a single recovery is available (*see Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 406).

Reprehensible conduct warrants the award of punitive damages (*BMW of N. Am. v Gore*, 517 US 559, 575; *see also State Farm Mut. Auto. Ins. Co. v Campbell*, __ US __, 123 S Ct 1513, 1519, 1520; *Cooper Indus. v Leatherman Tool Group*, 532 US 424, 434-435). While we regard the jury's award of $50 million to be excessive, the court's reduction fails to take into account the millions of dollars expended by defendants herein for legal fees in prosecuting the underlying action and the immense value of the family businesses. Since "the purpose of punitive damages is solely to punish the offender and to deter similar conduct on the part of others" (*Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 316), a more substantial penalty than $10 million is appropriate.

The evidence supports the jury's finding for plaintiffs on the causes of action of emotional distress and loss of consortium, and the amounts awarded thereon. That some of the emotional suffering might be attributable to defendants' conduct prior to the commencement of the underlying lawsuit does not preclude an award of damages "when it is manifest that a compensable injury has indeed occurred" (*Spinrad v Gasser*, 235 AD2d 687, 688) and that the harm may result from the aggravation of an existing injury (*see Holley v Transoceanic Cable*

Co., 301 AD2d 417, 420; *Salonia v Samsol Homes*, 119 AD2d 394, 396).

Finally, litigation over the ownership of the family's Japanese business interests is not material to plaintiff's malicious prosecution claim, and Supreme Court properly declined to vacate judgment on the basis of a ruling by a Japanese intermediate appellate court.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

M-4587–*Honzawa, et al. v. Honzawa, et al.*

Motion seeking leave to enlarge record denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 21, 2003

CATHERINE O'HAGAN WOLFE
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 98-602983
Assigned to Justice Ira Gammerman ISA part 27
Filed September 12, 2002

MITSUHIRO HONZAWA, YUKIKO HONZAWA,

Plaintiffs,

—v.—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE, MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION, WIEN MALKIN & BETTEX, LLP, ROBERT BUFF, DOUGLAS ARONIN, BETH JACOB, HOWARD PESKOE, LEBEOUF LAMB GREEN & MACRAE, LLP, MENAKER & HERRMANN, L.L.P., RICHARD G. MENAKER,

Defendants.

JUDGMENT

The issues in this action were duly tried before Justice Ira C. Gammerman and a jury at Trial Term, ISA Part 27 of this Court, held at the courthouse at 60 Centre Street beginning on March 11, 2002 and ending on March 21, 2002. Plaintiffs, Mitsuhiro Honzawa and Yukiko Honzawa, were represented by their attorneys, Robert O. Johnston and Mark Westerfield, of the law firm of Johnston & Westerfield, P.C., 3256 Prospect Street, NW, Washington, DC 20007, who were admitted *pro hac vice.* Defendants, both individuals and entities, were represented by their attorneys, Kenneth Lapatine and John Triggs, of the law firm of Greenberg Traurig, LLP, 885 Third Avenue, 21st Floor, New York, NY 10022.

This action, which was filed on June 17, 1998, involved claims of malicious prosecution and abuse of process. At the conclusion of the evidence, the Court dismissed the abuse of process claim as to all defendants (Trial Transcript at 1131-32), and dismissed plaintiffs' claims against Defendants Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa and Frank Ward, submitting to the jury Plaintiffs' malicious prosecution claim.

On March 21, 2002, the jury returned a verdict in favor of Plaintiffs as follows:

American Lawyers' Fees:	$ 1,148,763
Japanese Lawyers' Fees:	691,667
Mitsuhiro Honzawa's emotional distress:	1,131,250
Yukiko Honzawa's loss of consortium:	900,000
Punitive Damages:	50,000,000

Thereafter, Defendants filed motions to set aside and vacate the last four jury verdict amounts, the Japanese lawyers' fees, the emotional distress award, the loss of consortium award and the punitive damage award. Defendants' motion, together with Plaintiffs' opposition and Defendants' reply, were submitted to the Court on May 16, 2002. On August 15, 2002, Justice Gammerman ruled on the motions, granting the motion for judgment notwithstanding the verdict but only to the extent that the award for emotional distress to Plaintiff Mitsuhiro Honzawa, the loss of consortium award to Plaintiff Yukiko Honzawa, and the punitive damages were vacated. Justice Gammerman further ordered a new trial on the issue of punitive damages, unless Plaintiff agreed to an award of $10,000,000. Otherwise, Defendants' motions to set aside the verdict were denied, the Court thus upholding the damage awards for U.S. and Japanese attorneys' fees.

On September 4, 2002, the Court conducted a hearing to determine whether Plaintiff Mitsuhiro Honzawa would agree to the reduction in punitive damages. Counsel for Mitsuhiro Honzawa appeared and submitted a Notice of Plaintiff's Agreement to Award of Punitive Damages, which indicated Plaintiff Mitsuhiro Honzawa would accept the reduction. The Court next entered two credits in favor of defendants, one being the $550,000 already paid as sanctions pursuant to the order resolving the underlying case which provided the basis for the malicious prosecution action, and $150,000 paid by former Defendant Wein & Malkin to resolve claims against that law firm and certain of its attorneys.

Accordingly, the Court ordered the entry of judgment, solely in favor of Plaintiff Mitsuhiro Honzawa, in the amount of $11,140,430, jointly and severally against defendants Hirokuni Honzawa, Takara International,

Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation.

At the September 4, 2002, hearing Plaintiff Mitsuhiro Honzawa sought pre-verdict interest on the attorneys' fee components of the compensatory damages awarded, but the Court denied pre-verdict interest.

Now, on motion of Robert Johnston and Mark Westerfield, Plaintiff's attorneys, it is

ORDERED, ADJUDGED AND DECREED, that Plaintiff Mitsuhiro Honzawa recover against Defendants Hirokuni Honzawa, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation, jointly and severally, the sum of $11,140,430, with interest thereon from March 21, 2002, amounting to $480,718.00, together with costs and disbursements as taxed in the sum of $1095.00, making in all the sum of $11,622,243.00, and that the Plaintiff Mitsuhiro Honzawa have execution therefor.

Judgment signed September 12th, 2002.

[Illegible]
Clerk

Plaintiff's Address:

Mitsuhiro Honzawa
c/o Johnston & Westerfield, P.C.
3256 Prospect Street, NW
Washington, DC 20007

Defendants' Addresses:

Hirokuni Honzawa
c/o Hiro Real Estate Company
650 Madison Avenue
New York, NY 10022

Takara International, Inc.
650 Madison Avenue
New York, NY 10022

Hiro Real Estate Company
650 Madison Avenue
New York, NY 10022

Hiro Enterprise USA, Inc.
650 Madison Avenue
New York, NY 10022

655 Fifth Avenue Manhattan Corporation
650 Madison Avenue
New York, NY 10022

Takara Industry Corporation
650 Madison Avenue
New York, NY 10022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 27

#13880 Index No. 602983/98
Filed September 5, 2002

MITSUHIRO HONZAWA, YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISES USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION and TAKARA INDUSTRY CORPORATION,

Defendants.

Before:

HON. IRA GAMMERMAN, Justice.

Appearances:

JOHNSTON & WESTERFIELD, P.C.
Attorneys for Plaintiffs
3256 Prospect Street, N.W.
Washington, DC 200.07
BY: ROBERT O. JOHNSTON, ESQ., and
MARK G. WESTERFIELD, ESQ.

GREENBERG TRAURIG, LLP
Attorneys for Defendants
885 Third Avenue
New York, New York 10022
BY: KENNETH LAPATINE, ESQ., and
JOHN F. TRIGGS, ESQ.

THE COURT: This case is 13880.

There was a trial and a verdict, and then I struck a portion of the award and reduced another portion of the award. And the issue is whether or not the attorneys for the plaintiffs—actually there's only one plaintiff at this point—will, on behalf of their client, consent to the reduction in the punitive damage award. And if they are consenting, I'll direct the entry of an appropriate judgment. If they are not, we'll set a date to try that aspect of the case again.

MR. JOHNSTON: We are accepting, your Honor. We have a notice of acceptance which we would like to present.

THE COURT: Okay. Do we have a caption on this one?

MR. JOHNSTON: Yes.

THE COURT: Who is still in the case?

MR. LAPATINE: The parties that are still in the case are Hirokuni Honzawa and Takara Industry Corporation.

THE COURT: And the cooperation is in, so the judgment should be against the defendants jointly and severally, and they would be in favor of plaintiff Mitsuhiro Honzawa for the—do you have the amounts?

MR. TRIGGS: Your Honor, there's one other procedural issue. If your Honor remembers, there is a previous stipulated amount.

THE COURT: Yes. To reduce. The defendants are entitled to a credit for the previous payment of—

MR. LAPATINE: $550,000. And then they entered into a settlement with another defendant, and they haven't disclosed the amount of the settlement.

THE COURT: Which defendant?

MR. LAPATINE: One of the law firms that has since been dismissed from the case.

THE COURT: How much was that?

MR. JOHNSTON: $150,000.

MR. LAPATINE: So it's a $700,000 credit against whatever—

THE COURT: So why don't you give me the figures. If you can agree on the figures, I'll direct the entry of a judgment in favor of the plaintiff Mitsuhiro Honzawa against the remaining defendants jointly and severally for the amount $1,148,763, plus $691,667, plus $10 million, less $700,000, whatever that figure is.

And get a copy of this transcript, bring it to me, I write "So Ordered" on it, show it to the clerk, and you don't have to get an extract of the minutes. This will be an order directing the clerk to enter that judgment.

MR. JOHNSTON: There's an issue of pre-verdict interest on the attorneys' fees that were paid.

MR. LAPATINE: This was not a contract claim. This was a tort claim.

THE COURT: I think it's a tort claim. And I think Mitsuhiro Honzawa is doing very well, thank you.

Do you have the final number?

MR. WESTERFIELD: Yes. $1,840,430, and minus $700,000 would be $1,140,430.

THE COURT: Plus the award to the Japanese lawyers, and the $10 million; correct?

MR. WESTERFIELD: I added up the two numbers you gave me and got $1,840,430.

THE COURT: You subtracted $700,000 from that?

MR. WESTERFIELD: Yes, and I get $1,140,430.

THE COURT: So it becomes $11 million, I take it: right?

MR. WESTERFIELD: Right, plus the $10 million.

THE COURT: What's that?

MR. WESTERFIELD: That amount plus the $10 million is $11,140,430.

THE COURT: Okay.

(At this time the proceedings were concluded.)

—o0o—

CERTIFICATION:

This is to hereby certify that the foregoing is a true and accurate transcript of the proceedings as reported by me.

WILLIAM L. KUTSCH
William L. Kutsch
Senior Court Reporter

SO ORDERED

ENTER:

IRA GAMMERMAN JSC 9/5/02

IRA GAMMERMAN
9/5/02

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

Index No. 602983/98
P.C. No. 13880

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants.

Ira Gammerman, J.:

This is a post trial motion in a malicious prosecution action arising out of a family dispute concerning control of a number of corporate entities in Japan and the United States. Plaintiff Mitsuhiro Honzawa ("Mitsuhiro") was originally sued by Takara International, Inc. ("Takara") in New York and in Liechtenstein, for allegedly converting $2,346,841.28 in corporate funds ("the underlying litigation"). In connection with those lawsuits, approximately $2.5 million of Mitsuhiro's funds were

attached. The New York action was transferred to Federal Court, as was the one in Liechtenstein and the attachments were vacated. Mitsuhiro counterclaimed for judgment in his favor and for legal fees. The trial resulted in judgment for Mitsuhiro, both on Takara's claim against him and on his counterclaim. In addition, the court awarded sanctions, pursuant to Rule 11 of the Federal Rules of Civil Procedure. *See, Honzawa v Honzawa,* 268 AD2d 327 (1st Dept 2000). In June 1998, plaintiffs filed this action for malicious prosecution.

A jury trial was conducted in March 2002. At the close of evidence I directed a verdict dismissing the action as to defendants Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, and Frank Ward. Transcript of Trial ("Tr., at"), at 1131. On March 21, 2002, the jury awarded damages against the remaining defendants, as follows:

American Lawyers' Fees:	$ 1,148,763
Japanese Lawyers' Fees:	691,667
Mitsuhiro Honzawa's emotional distress:	1,131,250
Yukiko Honzawa's loss of consortium:	900,000
Punitive Damages:	50,000,000

Tr., at, at 1289-1291.

Defendants Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Company, and Takara Industry Corporation (collectively, the "Hiro Companies") move, pursuant to CPLR 4404 and 5501, for an order entering judgment notwithstanding the verdict in their favor on all claims against them. In addition, defendants Hirokuni Honzawa, Takara International Inc., and the Hiro Companies move for judgment notwith-

standing the verdict on: 1) the emotional distress claim; 2) the loss of consortium claim; 3) the claim for attorneys' fees and costs relating to plaintiffs' Japanese counsel; and 4) the claim for punitive damages. Alternatitely, should the court deny defendants' motion to set aside the verdict on the various claims, defendants ask that the court offer remititur or a new trial concerning each of the elements of damages, as being excessive, and with respective to punitive damages, order a new trial or issue an offer of remititur at an amount less than one times the compensatory damages.

JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE HIRO COMPANIES

Citing *Present v Avon Products, Inc.*, 253 AD2d 183 (1st Dept 1999) and *Du Chateau v Metro-North Commuter Railroad Co.*, 253 AD2d 128 (1st Dept 1999), the Hiro Companies argue that they are entitled to judgment notwithstanding the verdict, because they did not initiate the underlying litigation against Mitsuhiro and no evidence was presented indicating that they played an active or catalytic role in that litigation.

Plaintiffs contend that there was no real distinction between Takara International, Inc. and the Hiro Companies. Plaintiffs rely on the testimony of Hirokuni Honzawa. ("Hirokuni"), as the sole owner of the family businesses, and his son, Yukihiro Honzawa ("Yukihiro"), as an employee and officer of the Hiro Companies, that they did not distinguish between the various companies or the tasks performed on their behalf. Tr., at, at 828, 386. Plaintiffs also contend that the Hiro Companies are liable because of the actions of Yukihiro, Masahiro Honzawa ("Masahiro"), and Frank Ward ("Ward"), which were undertaken in connection with their roles as officers or employees of Hiro Companies. At the close of

testimony, however, I directed a verdict in favor of those defendants. Tr. 1131. I need not reach the question of whether evidence regarding their actions is sufficient to establish liability against the Hiro Companies, or the whether the doctrine of respondeat superior is applicable, however, because of plaintiffs' argument concerning the financing of the underlying litigation.

Plaintiffs argue that, while the Hiro Companies may not have initiated the underlying litigation, they paid for the legal fees for the litigation; and that Takara International did not have sufficient funds to underwrite the litigation (Testimony of Yukihiro Honzawa, Tr. 385-386) and, therefore, had the Hiro Companies not paid the legal fees, the litigation would not have continued.[1]

While the Hiro Companies do not contest that they paid at least some of the legal fees for the underlying litigation, they characterize plaintiffs' evidence concerning the payment of legal fees as "suspicion and speculation." Takara Defendants' Memorandum of Law, at 8. However, during the trial I directed the defendants to provide plaintiffs with a list of who paid for legal fees and how much was paid: Tr. 384-385. Apparently defendants failed to do so; therefore, they cannot now argue that plaintiffs had insufficient evidence of expenditures by the individual Hiro Companies.

The Hiro Companies contend that, even assuming they did pay the legal fees for the litigation, that payment does not constitute the kind of active participation in litigation required for liability for malicious prosecution.

It is clear that liability for malicious prosecution may result from "the initiation or continuation" of the litigation, *Ramos v City of New York,* 285 AD2d 284, 298 (1st Dept 2001). The question of what constitutes initi-

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[1] The parties stipulated that the legal fees for the plaintiff in the underlying litigation totaled $2,531,579. Tr., at 1020.

ation or continuation often arises in the context of a criminal prosecution, where merely reporting an alleged crime or even testifying at trial are not sufficient to trigger liability, *Present v Avon Products, Inc., supra.* Although there do not appear to be any direct holdings on whether payment of legal fees constitutes initiation or continuance, the Appellate Division has indicated that payment of legal fees may be considered by the jury as evidence that the defendant instigated or continued the litigation, *see Macauley v Theodore B. Starr, Inc.*, 194 App Div 643, 655 (1st Dept 1921), *affd* 233 NY 601 (1922):

> "No particular method of proof is necessary to connect the defendant with the prosecution alleged to have been instituted by him. Thus it has been held that to show that the defendant instigated the prosecution, it may be proved that *he employed counsel therefor*, or gave instructions, or *paid expenses*, or procured witnesses. . . (emphasis supplied)"

quoting 18 Ruling Case Law, at 18. The motion of the Hiro Companies for judgment notwithstanding the verdict based on their lack of responsibility for the underlying litigation is, therefore, denied.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WITH RESPECT TO DAMAGES AWARDED FOR EMOTIONAL DISTRESS

The jury awarded Mitsuhiro $1,131,250 for emotional distress. While a plaintiff in a malicious prosecution action may recover damages for whatever are the direct and natural results of the malicious prosecution, *Loeb v Teitelbaum*, 77 AD2d 92 (2d Dept 1980), *order amended*, 80 AD2d 838 (2d Dept 1981), the plaintiff must be able

to establish that the damages flowed from the prosecution, and not from some other cause, *see Miller v. New York*, 90 AD2d 483 (2d Dept 1982). Mitsuhiro testified concerning the emotional distress he experienced in connection with the events of 1995, and his testimony was corroborated by that of his wife. He was not able, however, to distinguish between the impact of the litigation initiated against him, in November 1995, by Takara International and the attachment of his property in connection with that litigation, and the economic impact of being removed from the Honzawa corporations by his brother. According to Mitsuhiro, in June 1995, he was told to take a leave of absence (Tr. 516), and although he was not regularly going to the office, he continued receiving salary through the summer. Tr. 598-599. At some point, however, he no longer received salary. When discussing the impact of the litigation on his family, he discussed the economic impact of no longer bringing home a regular salary. Tr. 534. That, however, was a result of being ousted from the family corporations, and not a direct result of the litigation. When, then, asked to describe the emotional impact of the litigation, he responded regarding the "drastic change in our circumstances. We lived in a tiny home," (Tr. 535) and regarding his distress at not being able to provide for his daughters' marriages. Tr. 536. Those changes in domestic circumstances, however, also resulted from the economic decline that followed his removal from the family corporations. In short, Mitsuhiro was unable to distinguish between the distress he experience from his financial reverses and that suffered as a result of the litigation against him. Tr. 538-539. Similarly, though Mitsuhiro testified about his emotional distress as a result of being called a thief by his mother and the change in his relationship with his mother, according to his testimony, that

occurred in June 1995, months before the litigation began. Tr. 524-526. Therefore, defendants' motion for judgment notwithstanding the verdict with respect to damages for emotional distress is granted, and I need not reach defendants' other arguments regarding the lack of corroborative evidence regarding the severity of plaintiff's injury and the amount of the award.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WITH RESPECT TO DAMAGES AWARDED FOR LOSS OF CONSORTIUM

The jury awarded Yukiko Honzawa ("Yukiko") $900,000 for loss of consortium resulting from the underlying litigation. According to her testimony, prior to the litigation, her husband was much nicer (Tr. 1005) and his "calm, loving face changed." Tr. 1003. Before the litigation she and her husband and their daughters would take long walks, would go to art museums, to the park, and to the zoo. Tr. 991. Her husband would perform "small kindnesses" such as rubbing her back, massaging her shoulders and pouring tea for her, and would assist her with household chores. Tr. 992-993. According to Yukiko, many of those stopped, because he became distracted by the litigation (Tr. 993, 995) and his attitude toward their children changed from being a "kind, gentle father" to one of "extreme irritation." Tr. 994.

In contrast with the testimony of her husband, Yukiko does specifically attribute the changes in their relationship to his distraction resulting from the litigation rather than the economic results of being removed from the family companies. However, a cause of action for loss of consortium is a derivative claim, *see, Spose v Ragu Foods, Inc.*, 124 AD2d 980, 981 (1st Dept 1986) (the wife's right to recover is " 'derived, both in a literal

and legal sense, from the injur(ies) suffered by her spouse'; [*Maidman v Stagg*, 82 AD2d 299, 305 (2d Dept)"]; *Dazzo v. Meyers*, 83-AD2d 14 (2d Dept 1981). It is, therefore, dependent on her husband being able to establish damages of either a physical or emotional nature, *see Garrison v Sun Printing & Publishinq Assn.*, 207 NY 1 (1912); *Pratt v Ocean Medical Care, P.C.*, 236 AD2d 380 (2d Dept 1997). Here, although Yukiko distinguished between the impact on her relationship with her husband caused by the litigation and that caused by the general accusations against her husband by family members and the financial pressures on her husband, he was not able to distinguish between the various causes of his emotional damages. Her testimony is not sufficient to sustain his cause of action for damages. Therefore, her cause of action, which is derivative of his, too, must fail, and I need not reach the question of whether the jury's award of $900,000 for Yukiko's loss of consortium was excessive.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WITH RESPECT TO THE FEES OF THE JAPANESE ATTORNEY

Takashi Maruyama, plaintiff's Japanese attorney in the underlying action, testified that the bill for legal services rendered by him in the underlying action totaled $1,544,714.50, at a rate of $350 per hour. He further testified that he had incurred $66,254.28 in travel expenses and $44,003.85 in hotel expenses. The jury awarded $691,667 in attorneys' fees for the work of plaintiff's Japanese attorney. Defendants challenge that fee award based on the failure of Mr. Maruyama to maintain the documents on which his bill for fees was based. Defendants further argue that, having made an award for less

than the amount of fees allegedly incurred, the jury found that the fees were unreasonable, and that since no documentation was provided to substantiate the fees, the award should be set aside. Defendants argue that under *Matter of Rahmey v Blum*, 95 AD2d 294 (2d Dept 1983) the hours claimed by Mr. Maruyama must be disallowed, because he failed to provide adequate documentation. In *Matter of Rahmey v Blum*, however, the Appellate Division was discussing the method of assessing fees under 42 USC § 1988, not under New York law. Certainly, it is preferable that attorneys seeking fees provide detailed contemporaneous records to substantiate those fees, particularly where the court is awarding attorneys fees pursuant to state or federal statute. Where such documentation is not provided, the court may reduce the award accordingly, *see, Hensley v Eckerhart*, 461 US 424, 433 (1983), or conduct a hearing to determine the reasonableness of the fee claimed, *see, Bankers Trust Co. of California, N.A. v West Shore Apt. Corp.*, 281 AD2d 351, 352 (1st Dept 2001).

Here, however, the award of fees was not made by the court, pursuant to statute, but rather was an element of damages determined by the jury, and as with other jury questions, was based primarily on the jury's determination of credibility. The jury heard the testimony of the Japanese attorney, Mr. Maruyama, who was cross-examined by counsel for defendants. Mr. Maruyama testified concerning the number of hours he devoted to the underlying litigation and his work for other retainer clients. There is no requirement that the jury have any specific documents on which to determine the credibility and weigh the testimony of a witness, and that assessment may lead the jury to reduce the amount of damages requested by the plaintiff.

With respect to defendants' argument regarding spoliation, there was no testimony that Mr. Maruyama purposely destroyed the notes on which his bills were based. Furthermore, this situation is far different from cases cited by defendants in which a party alleges injury by a defective product, such as a stove, and that appliance is discarded or destroyed before it can be examined by the defendants' expert, *see Horace Mann Ins. Co. v E.T. Appliances, Inc.*, 290 AD2d 418 (2d Dept 2002). Here, the notes which were allegedly lost would merely have served to support or undermine Mr. Maruyama's testimony concerning the hours he worked on the underlying litigation. Even without the notes, the jury could, and apparently did, assess the credibility of Mr. Maruyama's testimony, reducing the amount of fees requested by plaintiff. Defendants' motion for judgment notwithstanding the verdict with respect to Mr. Maruyama's fees is, therefore, denied.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WITH RESPECT TO PUNITIVE DAMAGES

Defendants challenge the jury's $50,000,000 punitive damages award as impermissibly excessive. Although there is no bright line establishing just how large a punitive damage award may be without running afoul of the Due Process guarantees of the United State Constitution, the issue has been examined several times in recent years by the United States Supreme Court. In the case of *Cooper Industries, Inc. v Leatherman Tool Group, Inc.*, 532 US 424 (2001), citing *BMW of North America, Inc., v Gore*, 517 US 559 (1996), the court listed three criteria that should be considered in determining whether a punitive damages award passes constitutional muster: (1) the degree of reprehensibility of the defendant's mis-

conduct, (2) the relationship between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, or, said another way, the ratio between compensatory damages and punitive damages and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[2] *In Pacific Mutual Life Insurance Company v Haslip.*, 499 US 1 (1991), the court discussed factors to be considered in addition to those indicated above, for purposes of appellate review, i.e., the duration of defendants conduct, the defendant's awareness, any concealment, the existence and frequency of similar past conduct, the profitability to defendant of the wrongful conduct, the financial position of the defendant, and the costs of litigation.

While it is difficult to compare the degree of reprehensibility of particular acts, here, the defendants initiated and/or continued meritless litigation against Mitsuhiro, attaching more than $2 million of his funds. Furthermore, the fact that the litigation was between family members, and not conducted by parties involved in mere business relations, increases the reprehensible nature of the underlying actions. I conclude that such conduct, which caused United States District Court Judge John Sprizzo to rule that the case merited sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, was sufficiently reprehensible to merit punitive damages, though not necessarily in the amount awarded by the jury.

The disparity between the degree of harm suffered by Mitsuhiro and the punitive damages awarded by the jury

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[2] Although the first two criteria appear to contain factors that are to be considered by the trier of fact (and should thus be included in the charge to the jury) the third criteria is apparently to be considered only by the reviewing court.

is somewhat more troublesome. Plaintiff argues that in *TXO Production Corp. v Alliance Resourpes Corp. ("TXO")*, 509 US 443 (1993) the United States Supreme Court upheld a ratio of 526 to 1 punitive damages award. The court expressly noted that, in affirming the award, it was considering not only the harm that *had* occurred, but the harm *that was likely to result* from the defendant's conduct. On that basis, the ratio came closer to 10 to 1, rather than the 526 to 1 asserted by plaintiffs, *id.* at 461-462, *see also, Pacific Mutual Life Ins. Co. v Haslip, supra.*

There is no specific point at which the ratio between punitive and compensatory damages is impermissible. Here, the jury awarded $50,000,000 in punitive damages, and a total of $3,871,680 in compensatory damages, which is a ratio of approximately 12.9 to 1. That ratio is not so far from the ratio upheld in *TXO* as to be totally unreasonable. However, I have found it necessary to grant judgment notwithstanding the verdict with respect to certain aspects of the compensatory award. As a result, the disparity between compensatory and punitive damages has been increased. For example, eliminating the award for emotional distress, because it cannot be sustained by the evidence, and the award for loss of consortium, because it is derivative of the emotional distress claim, reduces the compensatory damages to $1,840,430, shifting the ratio between punitive and compensatory damages to approximately 27 to 1.

With respect to awards in comparable cases, the defendants have submitted a compilation of verdict summaries from malicious prosecution cases gleaned from Westlaw's Jury Verdict Reporter. Those summaries reflect a substantial variation in total awards and in awards for punitive damages, with the largest total award of $16 million, with $1 million in punitive damages, *Komlosi v.*

Fudenberg, 1999 WL 33485321 (SD NY). On the lower end, there are several cases with total awards of approximately $50,000, with punitive damage awards ranging from $25,000 to a low of $10,000, *see, for example Mcarthur v Wal-Mart Stores, Inc.*, 1999 WL 33102770 (Sup Ct, Dutchess County); *Landsman v Moss*, 1992 WL 407665 (Sup Ct, Nassau County). Only rarely, in the cases cited by defendants, did the punitive damage award exceed the award of compensatory damages, *see Abramoski v Goldman*, 2000 WL 33594765 (Sup Ct, Suffolk County) (total award of $155,000, $100,000 of which was for punitive damages).

Contrary to plaintiffs' contention, I may consider these awards despite the fact that they have not been reviewed by appellate courts and arise in different factual settings. I note that many, if not all, of the cases cited by defendants involved allegations that unfounded criminal prosecutions were brought against the plaintiff, a situation which could certainly cause substantial pain and suffering and harm to the reputation of the person prosecuted. However, as the jury instructions indicated, one aspect of punitive damages is setting an amount that would in fact punish the defendants and deter them, as well as others, from acting in a similar way. Plaintiffs did not submit evidence of defendants current financial status; however, there was testimony concerning the substantial assets of defendants in 1995, when the underlying litigation was initiated,[3] and it was stipulated that Takara's legal fee in the underlying litigation was

---

[3] For example, Mitsuhiro Honzawa estimated that in 1995, the assets of the corporations were approximately 340 billion yen, or approximately $3.4 billion. Tr., at 474-476. He further testified that between 1977 and 1995, the companies increased their gross profit from approximately 3.5 billion to 8.5 billion yen, or from $35 million to $85 million. Tr., at 470.

approximately $2.5 million. Therefore, a jury could reasonably conclude that for a punitive damage award to have the intended effect it must be several million dollars.

Considering the factors specified by the United States Supreme Court in *Cooper Industries*, I conclude that the jury's award of punitive damages is " 'grossly disproportional to the gravity of . . . defendant[s'] offense[s].' " *Cooper Industries v Leatherman Tool, supra,* 532 US at 434. Accordingly, defendants' motion for judgment notwithstanding the verdict is granted with respect to the jury's award of punitive damages and the matter is remanded for a new trial unless the plaintiffs agree to accept an award of $10 million for punitive damages.

Accordingly, it is hereby

ORDERED that defendants' motion for judgment notwithstanding the verdict is granted to the extent that the awards for emotional distress, loss of consortium, and punitive damages are vacated; and it is further

ORDERED that a new trial is ordered on the issue of punitive damages unless the plaintiffs agree to an award of $10 million for punitive damages, and defendants' motion is otherwise denied.

Dated: August 15, 2002

ENTER:

IRA GAMMERMAN
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

New York County Clerk's
Index No. 602983/98

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants.

PRE-ARGUMENT STATEMENT

PLEASE TAKE NOTICE THAT Defendants Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation, by their attorneys Greenberg Traurig, LLP, hereby submit the following Pre-Argument Statement pursuant to § 600.17 of the Rules of the

Supreme Court, Appellate Division, First Judicial Department.

1. TITLE OF ACTION:

The title of the action is set forth above. The index number of the case in the court below, Supreme Court, County of New York, is 602983/98.

2. FULL NAME OF THE ORIGINAL PARTIES AND ANY CHANGES IN THE PARTIES:

The full names of the original parties are set forth in the caption above; no changes have been made.

3. NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL FOR APPELLANTS:

Kenneth A. Lapatine, Esq.
John F. Triggs, Esq.
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(212) 801-2100

4. NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL FOR RESPONDENT:

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Robert Johnston, Esq.
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(202) 342-9400

Local Counsel:

Peter Neger, Esq.
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5. COURT AND COUNTY, OR ADMINSTRATIVE BODY FROM WHICH THE APPEAL IS TAKEN:

This is an appeal taken from a Judgment of the Supreme Court of the State of New York, County of New York, entered in the office of the Clerk of New York County on September 12, 2002. Notice of Entry of the Judgment was served by hand upon counsel for Defendants on September 13, 2002, and thus this appeal is timely.

6. NATURE AND OBJECT OF THE CAUSE OF ACTION OR SPECIAL PROCEEDING:

This is an action by Plaintiffs seeking damages for malicious prosecution and abuse of process.

7. RESULT REACHED IN THE COURT OR ADMINISTRATIVE BODY BELOW:

Malicious prosecution and abuse of process claims were tried before Hon. Ira Gammerman, Supreme Court, New York County. The Court dismissed the abuse of process, in its entirety, as to all defendants and dismissed Plaintiffs' malicious prosecution claims against Defendants Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, and Frank Ward.

A jury verdict was returned in Plaintiffs' favor on malicious prosecution as to the remaining Defendants, finding damages as follows:

a. American Lawyers' Fees:	$1,148,763.00
b. Japanese Lawyers' Fees:	$691,667.00
c. Mitsuhiro Honzawa's emotional distress:	$1,131,250.00
d. Yukiko Honzawa's loss of consortium:	$900,000.00
e. Punitive Damages:	$50,000,000.00

The jury verdict was vacated, in part, and remitted, in part. Emotional distress and loss of consortium damages were vacated and the punitive damage award was remitted to $10,000,000.00 and accepted by Plaintiffs. The Court entered two credits in favor of Defendants resulting in the final damage award against Defendants Hirokuni Honzawa, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Corporation, and Takara Industry Corporation, in the amount of $11,622,243.00.

8. GROUNDS FOR SEEKING REVERSAL, ANNULMENT OR MODIFICATION:

The lower Court ernd: (a) in finding joint and several liability against Defendants, (b) in failing to further reduce the punitive damage award as excessive, (c) in failing to set-aside, in full, the award of Japanese attorneys fees, (d) in failing to dismiss the complaint in its entirety for lack of probable cause, and (e) in failing to dismiss as to Defendants Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation, on the grounds that their only participation in the underlying case was through the payment of legal fees, and therefore reversal is warranted on one or more of the above-listed grounds.

9. OTHER MATTERS PENDING:

A dissolution petition is pending before Hon. Paula Omansky, Supreme Court, New York County, Index No. 108032/01. A dispositive motion to dismiss is *sub judice*.

Dated: New York, New York
September 16, 2002

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: JOHN F. TRIGGS
John F. Triggs

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

New York County Clerk
Index No. 98-602983

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs-Respondents,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants-Appellants.

JURISDICTIONAL STATEMENT PURSUANT TO RULE 500.2

CORPORATE DISCLOSURE

The corporate Appellants in this case, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, Takara Industry Corporation ("Takara

Appellants") are privately held entities. The Takara Appellants are not owned in whole or in part by any publicly held entity. The Takara Appellants own varying percentages of the following companies: Hiro Investments, LLC, 655 Property, LLC, 100 Property, SPE LLC, 100 Property Associates, LLC, 100 Property, LLC, Takara Holding, LLC, Takara Associates, Inc., 617 Property, LLC, 39 AF Property, LLC. None of these entities are publicly traded, and none are owned in whole or in part by any other corporate entity other than the Takara Appellants.

(a)1. Title Of Action

The title of the action is as set forth in the caption. The following parties having been dismissed from the case and are no longer in the caption: Wien, Malkin & Bettex, L.P., Robert Buff, Douglas Aronin, Beth Jacob, Howard Peskoe, LeBoeuf Lamb Greene & MacRae, L.L.P., Menaker & Herman LLP, and Richard G. Menaker.

2. Source Of Appeal

This appeal is taken from the First Department Appellate Division. The order appealed from and notice of its entry was served by hand by the Respondents on the Appellants on October 21, 2003. The Decision and Order modified in part and affirmed in part the Decision and Order of the trial court entered after a jury verdict. There are no longer any claims pending in this case.

3. The Notice Of Appeal

Notice of Appeal to this Court was served on counsel for Appellants on October 24, 2003 by U.S. Mail and facsimile and filed on October 24, 2003 in the New York County Clerk's Office.

4. Order Appeared From And Notice Of Entry

The Decision and Order of Appellate Division First Department was entered on October 21, 2003 and served by hand the same day.

5. Attorneys For Respondents

The names and addresses for the attorneys for Respondents is Johnston & Westerfield, 3256 Prospect Street, N.W., Washington, D.C. 20007-3214, and Bingham McCutcheon, LLP, 399 Park Avenue, 24th Floor, New York, New York 10022.

(b) COPIES OF NOTICES OF APPEALS AND ORDERS

Attached hereto as:

(1) Exhibit "A" is a copy of the Notice of Appeal with proof of service from the decision and order of the Appellate Division First Department;

(2) Exhibit "B" is copy of the October 21, 2003 decision and order of the First Department;

(3) A copy of the decision and order of the State Supreme Court entered September 12, 2002;

(4) See Exhibit B;

(5) See Exhibit C;

(6) Not applicable.

(c) JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction to hear this appeal pursuant to CPLR 5601(b)(1) because the $15,000,000.00 punitive damages award raises due process questions under both Article I Section 6 of the New

York State Constitution and the Fourteenth Amendment to the United States Constitution.

The specific issues to be raised in this appeal are as follows:

I The jury awarded the Respondents $50,000,000.00 in damages which the trial court reduced to $10,000,000.00. The Appellate Division's increased award of $15,000,000.00 in punitive damages was grossly excessive and violated Article 1 Section 6 of the New York Constitution and the Fourteenth Amendment of the U.S. Constitution in that:

1. The Court failed to consider a comparison of the amount of the punitive damages award and the amount of the civil penalties authorized or imposed for comparable misconduct;

2. The Court failed to consider a comparison of the amount of punitive damages to the actual harm inflicted on the Respondents as a result of the institution of the underlying action;

3. The Court failed to consider the degree of reprehensibility of Appellants' conduct in light of the absence of aggravating factors, in that:

the injury claimed by plaintiff as a result of the institution of the underlying action was purely economic;

defendants' alleged tortious conduct did not evince an indifference to, or a reckless disregard of, the health or safety of others;

defendants were not shown to be recidivists;

4. In connection with conduct outside New York, the Court impermissibly considered conduct outside of its jurisdiction which preceded the institution of the underlying action and in particular:

> the court relied on out of state conduct that could not form the factual basis for compensatory damages to justify the award of punitive damages;
>
> punished defendants for out of state conduct which has been established to be lawful where it occurred;
>
> refused to enlarge the record to include a final decision holding that defendants' out of state conduct was lawful where it occurred.

5. The Court impermissibly awarded punitive damages to punish and deter conduct that bore no relation to the harm for which Respondents received compensatory damages;

6. The Court impermissibly calculated its award of punitive damages on a ratio approaching 5 times the compensatory damages in the award as modified (and eight times the compensatory damages in the original judgment), notwithstanding that compensatory damages were substantial, and that an element of the compensatory damages was duplicated in the punitive damages;

7. The Court impermissibly justified the award of punitive damages on incompetent evidence concerning the alleged wealth of Appellants;

8. The charge to the jury was improper because it did not incorporate any of the guidelines enunciated by the United States Supreme Court in *State Farm Mutual Automobile Insurance Co., v. Campbell*, 123 S.Ct. 1513 (2003);

9. The punitive damage award is so excessive as to be inconsistent with the common law of the State of New York.

II The trial court should have set aside the verdict because a judgment entered by the Japanese Supreme Court proves that Respondents' core testimony and crucial theories advanced at trial were false.

III The trial court was required to instruct the jury that probable cause was presumed and to overcome that presumption the Respondents were required to establish fraud or perjury because the courts in the underlying action issued preliminary and interlocutory orders by which those courts acknowledged the merits of the underlying action.

IV The Appellate Division should have enlarged the record to include the decision of the Japanese Supreme Court which conclusively demonstrated that the Respondents' proof of the malice element in a malicious prosecution claim was false.

IV The evidence at trial was not sufficient to establish a lack of probable cause to have commenced the underlying action upon which this malicious prosecution action is based.

V The damages for costs and fees incurred by Mitsuhiro's Japanese attorney should have been rejected because of the spoliation of the crucial evidence upon which such damages were based.

VI The corporate defendants should not have been held jointly and severally liable for malicious prosecution.

VII The Appellate Division should not have reinstated the jury's verdict for loss of consortium which had been set aside by the trial judge.

VIII The Appellate Division should not have reinstated the jury's verdict for emotional distress which had been set aside by the trial judge.

(d) Not Applicable

Dated: New York, New York
October 31, 2003

GREENBERG TRAURIG, LLP

By: JOHN F. TRIGGS
John F. Triggs
Attorneys for the Defendants-Appellants, Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, Takara Industry Corporation

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Attorneys for Respondents

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Clerk
Index No. 98-602983

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTICE That the above named defendants pursuant to CPLR 5601(b)(1) appeal to the Court of Appeals from an order of the Appellate Division First Department entered in the office of the Clerk of the Appellate Division on October 21, 2003, a true copy of which is attached hereto, and which order finally determines this action in which there is directly involved a

construction of provisions of Article 1 Section 6 of the Constitution of the State of New York and of the Fourteenth Amendment of United States Constitution.

PLEASE TAKE FURTHER NOTICE That the defendants' appeal from each and every part of that order of the Appellate Division as well as from the whole order.

Dated: New York, New York
October 24, 2003

GREENBERG TRAURIG, LLP

By: JOHN F. TRIGGS
John F. Triggs
Attorneys for the Defendants, Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, Takara Industry Corporation

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Attorneys for Plaintiffs

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 602983/98
(Gammerman, J.)

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISE USA, INC., 655 FIFTH AVENUE MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION,

Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that Defendants, Hirokuni Honzawa, Yoshiko Honzawa, Masahiro Honzawa, Yukihiro Honzawa, Frank Ward, Takara International, Inc., Hiro Real Estate Company, Hiro Enterprise USA, Inc., 655 Fifth Avenue Manhattan Corporation, and Takara Industry Corporation, hereby appeal to the Appellate Division, First Department, of the Supreme Court of the

State of New York from the Judgment entered in the Office of the Clerk of the Supreme Court of the County of New York on September 12, 2002, and from each and every part thereof.

Dated: New York, New York
September 16, 2002

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Attorneys for Plaintiffs

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 27

Index Number 602983/98
March 12, 2002

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISES, U.S.A., 655 5TH AVE. MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION, WIEN, MALKIN & BETTEX, LLP, ROBERT BUFF, DOUGLAS ARONIN BETH JACOB, HOWARD PESKOE, LEBOEUF, LAMB, GREENE & MACRAE, LLP, RICHARD G. MENAKER,

Defendants.

BEFORE:

HONORABLE IRA GAMMERMAN, Justice.
and a Jury

APPEARANCES:

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Attorneys for the Plaintiffs
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BY: ROBERT O. JOHNSTON, ESQ.
MARK WESTERFIELD, ESQ.

GREENBERG TRAURIG, LLP
Attorneys for the Defendants
885 Third Avenue
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BY: JOHN E. TRIGGS, ESQ.
KENNETH LAPATINE, ESQ.

---

happened to those records in the absence of the jury and decide at that point.

MR. LAPATINE: I would like to make a point.

THE COURT: Make it then. Why don't we move on.

MR. LAPATINE: The last goes to an injury relating to emotional distress and loss of reputation—

THE COURT: Didn't I leave that in?

MR. LAPATINE: On three occasions you told them that they would have to have corroborative evidence with respect to these damages issues.

Now, they do not have, with respect to emotional distress—

THE COURT: Loss of reputation I said, with respect to loss of reputation, it seems to me they have to produce

someone who is going to testify that his view of the defendants' reputation was damaged as an result of this lawsuit.

And that is what I said.

And I wasn't going to let the defendant himself testify that his reputation was damaged.

MR. LAPATINE: You also ruled they would have to bring any such witness to the United States within two weeks of the trial.

THE COURT: Absolutely.

MR. LAPATINE: They don't have that witness.

THE COURT: Then that claim is going to be eliminated.

MR. WESTERFIELD: Are we dealing with reputation or emotional distress?

THE COURT: Reputation.

MR. WESTERFIELD: Reputation issue. I don't know where the line is—

THE COURT: Counsel, I made myself very clear.

MR. WESTERFIELD: Can I explain the situation? We have a witness here—

THE COURT: Unless there is someone prepared to testify that his view of the defendant, the individual defendant's reputation was lowered as a result of this litigation, that claim will not be submitted to the jury.

MR. WESTERFIELD: Can I explain certain scenarios?

THE COURT: Yes, of course.

MR. WESTERFIELD: For example, we have a list of 50 people our client dealt with on a regular basis over the

course of 30 years. He will testify that after this word got out as to what he did, those people never contacted him again.

THE COURT: No, I made myself absolutely clear, no. That is it. That is not going to the jury.

What else?

MR. LAPATINE: Emotional damage. They need medical testimony to corroborate medical—

THE COURT: Yes.

MR. LAPATINE: They have none. No expert report.

MR. WESTERFIELD: There is no case that supports that situation. However, malicious prosecution.

THE COURT: I don't know, did I ask, did I discuss this previously?

MR. LAPATINE: No.

THE COURT: I think we will let that go to the jury.

Anything else?

MR. LAPATINE: Your Honor, we cited in our brief three or four cases that, in which the Appellate Division specifically said in order to support an emotional injury you need objective proof and that objective proof must be medical testimony.

MR. WESTERFIELD: Those are cases having to do with ovum being implanted in some other woman. That is the case they cited for this principle. There are negligence cases having to do—

THE COURT: I assume there are negligent cases involving infliction of emotional distress in which the jury has been permitted to determine damages without a

physician testifying. I mean it certainly goes to the weight of the claim and certainly within my opinion would affect the measure of damages.

I would tell you right now without medical testimony, I would, in my view, even limit the damages that any jury awards in this regard.

Counselor, I have ruled.

Anything else we have to talk about now?

MR. WESTERFIELD: Can I refer you to Hickey, which is a Court of Appeals case which specifically applies in this case, and does not require medical testimony.

THE COURT: Counselor, if there is no medical testimony, I will certainly limit the damages that the jury can award, I will tell you that right now, so I don't know what we are trying this case for except to make lawyers rich.

I will see you all tomorrow at 9:30. (Trial adjourned to March 12, 2002, at 9:30 a.m.).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 27

Index Number 602983/98
March 12, 2002

MITSUHIRO HONZAWA and YUKIKO HONZAWA,

Plaintiffs,

—against—

HIROKUNI HONZAWA, YOSHIKO HONZAWA, MASAHIRO HONZAWA, YUKIHIRO HONZAWA, FRANK WARD, TAKARA INTERNATIONAL, INC., HIRO REAL ESTATE COMPANY, HIRO ENTERPRISES, U.S.A., 655 5TH AVE. MANHATTAN CORPORATION, TAKARA INDUSTRY CORPORATION, WIEN, MALKIN & BETTEX, LLP, ROBERT BUFF, DOUGLAS ARONIN BETH JACOB, HOWARD PESKOE, LEBOEUF, LAMB, GREENE & MACRAE, LLP, RICHARD G. MENAKER,

Defendants.

BEFORE:

HONORABLE IRA GAMMERMAN, Justice.
and a Jury

APPEARANCES:

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no bank accounts with Takara International on it in Hong Kong. Takara International would have been required to file taxes in the U.S. on that income received in Hong Kong had they ever declared income. It had shops in Hong Kong, but never declared those shops as an asset, never declared income from the shops as income. It had never taken any depreciation on the shops as income in Hong Kong.

There was no connection whatsoever between the Takara International and the money that Mitsuhiro transferred, and there was no effort on their part to find out if there was any connection before they sued, in part because they would have been prudent for themselves or for their lawyers. This wasn't good faith, a good faith basis for the lawsuit.

We are going to go through with Yukihiro, he will be here, he's talking about the affidavit, the lawyers—actually somee of them left. We'll talk to you about their affidavits and what they did. And they've already testified in deposition that they believed when they filed the affidavit that the basis for it was Yukihiro's affidavit, and that was explained, and that was valid, and they should rely on what the client told them. And you will hear that testimony earlier or later this morning.

Moving slowly. Why would they do this? We have explained the role of the sons, the sons became of age. This was an effort to transfer management control to the sons. And I told you I'm not going to go into any detail, there will be testimony, but the sons admittedly, they discussed replacing Mitsuhiro, in their own plans for replacing him before Mitsuhiro ever came to New York.

As a direct result of the allegations of theft, and Mitsuhiro will describe to you the fact that has in Japan, Japanese society, which is hard to say what it would be like here, but you can tell what it's like there, which is if you are stealing from corporate funds, it's about the worst thing you can do, because they—

MR. LAPATINE: Objection, your Honor.

THE COURT: Yes, we are not going to deal with that, counselor, I already ruled. Let's proceed. So he is not going to testify on the effect it had in Japan, I'll tell you that right now. Let's proceed.

MR. WESTERFIELD: He will describe to you the effect that this has had on him and his family.

THE COURT: He can describe that.

MR. WESTERFIELD: Pardon?

THE COURT: He can testify about that.

MR. WESTERFIELD: He's going to describe to you that —the basis—as a result of the false allegations, he was fired as the director and an officer.

He will describe to you the relationship he had with his other family members, including his mother. His mother is in her 80s. And it's part of their society, he would go to visit her once a week, he brought flowers, he had a very traditional visitation or custom they followed. He would go to her quite often.

Since these allegations were made, not only was he dismissed as director, but the mother has completely turned against him. She's accepted these allegations as being true, although Hirokuni has admitted he has not explained to her the result of the trial of the Takara International, and she's completely turned against him. She was one of the directors of the Japanese corporations, so that led to his being fired or terminated in Japan.

I haven't described—I'm going to just touch on it very briefly. In addition to suing him in the U.S., and getting attachments in the U.S., they concurrently sued him, the same exact allegation and same affidavit signed by the nephew of Mitsuhiro in Liechentenstein to attach the money, they also sued him for that in Hong Kong to make the same allegations there, and also sued him in Japan, all going at the same time. So ultimately he had the same litigation pending on four continents.

The intention of this case was to cut Mitsuhiro off from his funds, to make him spend the money that he had available to him. He will describe to you—this is common in Japan, very unusual in our society, a corporate executive essentially leaves all of his assets, and

this is what he and his brother had done, all—all of their assets were in the company.

So we would assume under U.S. normal procedures that the money was held by the executives, but in this case, virtually all of his money was held by the company. So when he was cut off from salary and other income, he was left almost nothing.

MR. LAPATINE: Objection, your Honor. I'm not sure what this is relevant to.

THE COURT: Let's find out. Members of the jury, there are very clear circumscribed claims that are going to be submitted to you. I suspect this is not one of them.

Let's proceed.

MR. WESTERFIELD: The reason that the claim, this explains the malice, the malice and improper purpose, this is why the lawsuit was filed, in order to justify firing Mitsuhiro to the bankers, to the family members, and to turn the family members against Mitsuhiro.

They had to do something other than simply say, okay, we want to push you out. And the allegations of theft were made in this case, those were the basis for terminating his employment. Hirokuni admits to that. Yukihiro admits to that. Masahiro admits to that. That part of it is not in dispute.

The reason Mitsuhiro is suing is a couple of things. One, being compensated for what he spent in defending the initial trial, the Takara International trial. So one of the clams he will make is going to be for reimbursement of his legal fees. But in many ways that's a small part of what he is seeking.

He is also entitled to damages, money damages for payment to compensate for emotional injury he suffered

from being called a thief, from the change of his relationship with his family. All the money, financial aspects that would flow directly from someone saying you are a thief and being kicked out of your own business, he's entitled to compensation for that. And under our system, that's ends up equated in some way with dollars for that emotional loss, and that's what we are asking for.

Mitsuhiro is suing, you heard of malicious prosecution, there is a separate cause of action which is for abuse of process that relates to the money that had initially been attached in the Liechentenstein matter. We will describe to you, it came back to the U.S. still under a court order, so even in the time period when the second law firm had said they could not win the case, they still refused to give that money back to Mitsuhiro.

There were a few different times where demands were made, saying look, you admit you can't win, give him the money back that's been attached, and both times they said no. And they held it, even admitted that they couldn't win, they held the money for another nine months or so. And in part to continue the implication that they were justified in doing so. In part to show that he was a thief.

We're also going to ask you for punitive damages. When this is done, this is a case that shouldn't have been filed, it was done maliciously, it was done without evidence. It was done on the part of Hirokuni and his family, knowing that the allegations were false, they did it in a way to try and seize control of the family business by using this case and allegations in this case. And as a result we are going to ask you to impose punitive damages.

I've a few additional points I would like to make regarding things that I think you will hear as part of the defense of the case.

First of all, under this procedure in this case, they are going to be able to explain the financial record or apparently will be able to do so. But you need to ask yourself as you hear the testimony, ask whether it was available to them during the Takara International trial, when they presented it in that trial or whether this is just a new spin on exactly the same old information.

They're going to present testimony from a friendly accounting expert, assuming he's allowed to testify—I expect I'm going to use his information to show that there was more than enough money, personal money in the account in Hong Kong to have allowed Mitsuhiro to transfer his own personal money to another bank. So instead of showing this was Takara International money, it will actually show it was Mitsuhiro's personal money.

One thing that has been done in the past, I don't know whether it will happen in this case, is at some point they're referring to Takara International money, which is what they say was stolen, and other times they talk about corporate money. Now, the implication